NO. 84-665

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

J.A. MASSARO, *et al.*,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973

BRIEF IN OPPOSITION

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Respondent, NJ Transit Rail Operations, Inc.
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(201) 648-3710

JAMES J. CIANCIA,
Assistant Attorney General,
KENNETH S. LEVY,
Deputy Attorney General,
Of Counsel.

ROBERT H. STOLOFF,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 1188 Raymond Boulevard, Newark, New Jersey 07102—(201) 623-8611

Counter-Statement of Questions Presented

1. Whether a petition for a writ of certiorari to review a judgment of the Special Court, filed more than seventy days after the judgment was entered, was filed in a timely manner where the statutory provision allowing a petition for a writ of certiorari to review a Special Court action, 45 U.S.C. §1105(b), requires that the petition be filed within twenty days after entry of the judgment.

2. Whether a commuter authority and a rail union may renegotiate seniority provisions contained in an agreement awarded pursuant to 45 U.S.C. §588 without granting a hearing to affected employees where 45 U.S.C. §588 does not give employees a right to be heard in the first instance.

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BRIEF IN OPPOSITION

Counter-Statement of the Case

This matter comes before the Court on a Petition for a Writ of Certiorari by certain employees of respondent New Jersey Transit Rail Operations, Inc. (NJ Transit) to review a judgment of the Special Court (created pursuant to the Regional Rail Reorganization Act of 1973) upholding an amendment to an award made pursuant to

§508 of the Rail Passenger Service Act (RPSA). 45 U.S.C. §588. Section 508 was enacted as part of the Northeast Rail Services Act of 1981 (NRSA), Pub. L. No. 97-35 (August 31, 1981), 95 Stat. 357, 669, which among other purposes was enacted to accomplish the transfer of commuter rail operations in the Northeast from the Consolidated Rail Corp. (Conrail) to commuter authorities effective January 1, 1983. As part of the statutory scheme to accomplish the transfer §508 required an implementing agreement to be negotiated between commuter authorities and representatives of employees of Conrail to effect the transfer of employees from Conrail to commuter authorities. Section 508 required arbitration of the implementing agreement where an agreement could not be reached. Following negotiation or arbitration of the implementing agreement §510 of RPSA, 45 U.S.C. §590, required negotiation of a collective bargaining agreement.

In the instant case, when NJ Transit and respondent Brotherhood of Locomotive Engineers (BLE) could not reach an agreement the matter was submitted to arbitration and an award was issued on October 14, 1982 (Pa3).* After the October 14, 1982 award, the BLE and NJ Transit reached an agreement on a seniority provision different than that contained in the award. The matter was then resubmitted to the neutral referee who on December 14, 1982 amended the award pursuant to the parties agreement (Pa4-5). In the winter of 1984, petitioners sought review in the Special Court of the amended award. On the motions of respondents NJ Transit and BLE the Special Court dismissed petitioners' petition for review finding the amended award to be consistent with the statute. The order dismissing the complaint was filed on August 8, 1984 (Pa13).

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* "Pa" refers to the Appendix attached to the Petition for a Writ of Certiorari.

On October 25, 1984, 78 days after dismissal order was entered, petitioners filed their petition for a writ of certiorari with the Court. Petitioners do not dispute the Special Court's holding that the amended award, like the initial award, complied with the provisions of 45 U.S.C. §588. They merely argue that prior to any change in the award, the individual members of the union were entitled to "due process."

Summary of Argument

The statute which provides for judicial review of actions taken pursuant to NRSA, including actions taken pursuant to 45 U.S.C. §588, clearly provides that a petition for a writ of certiorari to review a decision of the Special Court "shall be filed not more than twenty days after entry of such order or judgment." 45 U.S.C. §1105(b). Because the petition in this matter was filed more than twenty days after the judgment of the Special Court, the petition is out of time.

It is well settled that a union and employer are free to renegotiate provisions of a collective bargaining agreement related to seniority. There is no basis for petitioners' claim that they are entitled to due process prior to any such renegotiation.

ARGUMENT

A. This Court lacks jurisdiction to grant a writ of certiorari because the petition for the writ was filed out of time.

It has long been recognized that the Court lacks jurisdiction to entertain a petition for a writ of certiorari that is not filed within the statutory time limits. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-418 (1923). 45 U.S.C. §1105(b) clearly provides that a petition for a writ of certiorari to review a decision of the Special Court in any action referred to in that section "shall be filed not more than twenty days after entry of such order or judgment." In this case petiitoners concede that jurisdiction is based on 45 U.S.C. §1105(b). Therefore, the Court lacks jurisdiction to hear this petition for a writ of certiorari because it was filed more than fifty days after the twenty day time limit expired.

B. Petitioners had no due process rights with respect to a renegotiation of seniority provisions between respondents NJ Transit and BLE.

Citing *Fire Fighters Local Union No. 1784* v. *Stotts*, —— U.S. ——, 81 L.Ed.2d 483 (1984), petitioners argue that "seniority rights belong to individuals and Unions should not be permitted to trade off an 'existing' seniority system without due process for those employees adversely affected." What the Court held in *Stotts* was that a district court may not require layoffs of white employees when a bona fide seniority system would require the layoff of black employees with less seniority. The decision was based on a statutory interpretation of §703(h) of Title VII of the Civil Rights Act of 1964. That statute is in no way

involved in this matter, and therefore, the *Stotts* decision has absolutely no applicability to the due process claim asserted by petitioners.

While there is no case law to support the principle that an employer and union may not renegotiate seniority provisions without giving a due process hearing to affected employees, this Court long ago held that seniority rights may be changed by agreements between unions and employers. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953); *Humphrey* v. *Moore,* 375 U.S. 335 (1964). In this case the seniority provision was awarded pursuant to a statute, 45 U.S.C. §588, which itself contained no requirement of a hearing for affected employees. Thus, there is no case law or statute which provides any support for petitioners' due process claim.

Petitioners have not disputed the finding of the Special Court that the amended seniority system was in complete compliance with the requirements of 45 U.S.C. §588. They merely argue that the seniority provisions could not be changed without due process. Because seniority rights have always been viewed as a subject of continuing negotiations between the union and employer, and because 45 U.S.C. §588 did not require a hearing for the initial negotiation of seniority provisions in the agreement, it is clear that no property rights were created which would require a due process hearing prior to a change in the seniority system.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition of writ of certiorari should be denied.

Respectfully submitted,

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Respondent, NJ Transit Rail Operations, Inc.

JAMES J. CIANCIA,
Assistant Attorney General,
KENNETH S. LEVY,
Deputy Attorney General.
Of Counsel.

ROBERT H. STOLOFF,
Deputy Attorney General,
On the Brief.

November 19, 1984